

FILED

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO DOMINGUEZ,	)	No. C 12-5896 RMW (PR)
	)	
Petitioner,	)	ORDER GRANTING
	)	RESPONDENT'S MOTION TO
vs.	)	DISMISS; DENYING CERTIFICATE
	)	OF APPEALABILITY
	)	
WARDEN HEIDI M. LACKNER,	)	(Docket No. 16)
	)	
Respondent.	)	
_____	)	

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence imposed by the Superior Court of Contra Costa County. The court issued an order to show cause. In lieu of an answer, respondent has filed a motion to dismiss the petition as untimely. Petitioner has filed an opposition, and respondent has filed a reply. For the reasons stated below, the court GRANTS respondent's motion to dismiss the petition as untimely.

**I. BACKGROUND**

On March 24, 2006, petitioner was sentenced to a term of 24 years in state prison after being convicted of seven counts of committing a lewd or lascivious act on a child under the age of 14 years. (MTD at 2, Ex. 1.) On September 28, 2007, the California Court of Appeal affirmed (id., Ex. 2), and on December 12, 2007, the California Supreme Court denied review (id., Ex. 3.).

1 On December 21, 2010, petitioner filed a state habeas petition in superior court. (MTD at  
 2 2.) On February 16, 2011, the superior court denied it. (Id., Pet. at 63-65.) On March 2, 2011,  
 3 petitioner filed a state habeas petition in the California Court of Appeal, which was denied on  
 4 March 10, 2011. (MTD, Ex. 4; Pet. at 67.) On April 22, 2011, petitioner filed a state habeas  
 5 petition in the California Supreme Court, which was denied on September 28, 2011. (MTD, Ex.  
 6 5; Pet. at 69.)

7 On November 19, 2012, petitioner filed the underlying federal petition.

## 8 **II. DISCUSSION**

9 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) became law on  
 10 April 24, 1996, and imposed for the first time a statute of limitations on petitions for a writ of  
 11 habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state  
 12 convictions or sentences must be filed within one year of the latest of the date on which: (1) the  
 13 judgment became final after the conclusion of direct review or the time passed for seeking direct  
 14 review; (2) an impediment to filing an application created by unconstitutional state action was  
 15 removed, if such action prevented petitioner from filing; (3) the constitutional right asserted was  
 16 recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and  
 17 made retroactive to cases on collateral review; or (4) the factual predicate of the claim could  
 18 have been discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time  
 19 during which a properly filed application for state post-conviction or other collateral review is  
 20 pending is excluded from the one-year time limit. 28 U.S.C. § 2244(d)(2).

21 “Direct review” includes the period within which a petitioner can file a petition for writ  
 22 of certiorari from the United States Supreme Court, whether or not the petitioner actually files  
 23 such a petition. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999). Accordingly, if a petitioner  
 24 fails to seek a writ of certiorari from the United States Supreme Court, the AEDPA’s one-year  
 25 limitations period begins to run on the date the ninety-day period defined by Supreme Court  
 26 Rule 13 expires. See Miranda v. Castro, 292 F.3d 1063, 1065 (9th Cir. 2002).

27 Here, petitioner’s conviction became final on March 11, 2008, ninety days after the  
 28 California Supreme Court denied his petition for review. See id. Thus, pursuant to 28 U.S.C.

1 § 2244(d)(1)(A), AEDPA's one-year limitation period began to run the following day, and  
2 expired one year later, on March 11, 2009. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th  
3 Cir. 2001). The instant petition was filed over three years later, on November 19, 2012.

4 The one-year statute of limitations is tolled under § 2244(d)(2) for the "time during  
5 which a properly filed application for State post-conviction or other collateral review with  
6 respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Here, there is no  
7 basis for statutory tolling because petitioner's first state habeas petition was not filed until  
8 December 2010, over one year after the limitations period had already expired. See Ferguson v.  
9 Palmateer, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation  
10 of the limitations period that has ended before the state petition was filed," even if the state  
11 petition was timely filed). Accordingly, petitioner's first state petition did not toll the statute of  
12 limitations. Moreover, petitioner's remaining state habeas petitions were all filed after the  
13 limitations period had already expired, and thus, could not have extended the limitations  
14 deadline. See id.

15 Petitioner also does not demonstrate that he is entitled to equitable tolling. The Supreme  
16 Court has determined that Section 2244(d) is subject to equitable tolling in appropriate cases.  
17 Holland v. Florida, 130 S. Ct. 2549, 2560 (2010). "[A] petitioner is entitled to equitable tolling  
18 only if he shows (1) that he has been pursuing his rights diligently, and (2) that some  
19 extraordinary circumstance stood in his way and prevented timely filing." Id. at 2562 (internal  
20 quotation marks omitted). Once a petitioner is notified that his petition is subject to dismissal  
21 based on AEDPA's statute of limitations and the record indicates that the petition falls outside  
22 the one-year time period, the petitioner bears the burden of demonstrating that the limitation  
23 period was sufficiently tolled under statutory or equitable principles. See Smith v. Duncan, 297  
24 F.3d 809, 814 (9th Cir. 2002).

25 Here, petitioner was given notice that the petition was subject to dismissal, and was  
26 provided an opportunity to respond. However, petitioner does not attempt to show diligence.  
27 Nor does he present any argument as to what or how extraordinary circumstances stood in his  
28 way and prevented timely filing. See Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009)

(internal quotation marks and citations omitted).

More importantly, petitioner has not set forth any argument that he is entitled either statutory or equitable tolling, and the court is unaware of any basis for tolling in this case. Accordingly, the federal habeas petition is untimely.

### III. CONCLUSION

Respondent's motion to dismiss the petition is GRANTED. The instant petition is DISMISSED. The clerk shall terminate all pending motions and close the file.

### IV. CERTIFICATE OF APPEALABILITY

For the reasons set out in the discussion above, petitioner has not shown "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, a COA is DENIED.

**IT IS SO ORDERED.**

DATED: Feb 18

  
RONALD M. WHYTE  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO DOMINGUEZ,  
Plaintiff,

Case Number: CV12-05896 RMW

**CERTIFICATE OF SERVICE**

v.

WARDEN HEIDI M. LACKNER,  
Defendant.

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I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 18, 2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Francisco Dominguez F-22191  
Valley State Prison (VSP)  
PO Box 96  
Chowchilla, CA 93610-0096

Dated: February 18, 2014

Richard W. Wieking, Clerk  
By: Jackie Lynn Garcia, Deputy Clerk